

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2771

Cir. Ct. No. 2012CV68

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EDWARD J. AND ARVILLA DUQUAINE TRUST,

PLAINTIFF-APPELLANT,

V.

CITY OF ALGOMA,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, R.J.

¶1 PER CURIAM. The Edward J. and Arvilla Duquaine Trust appeals a judgment dismissing its excessive assessment claim against the City of Algoma. The circuit court determined the City's 2011 assessments of five properties owned by the Trust were entitled to a presumption of correctness, which the Trust failed

to overcome. The Trust asserts it successfully overcame the presumption of correctness by demonstrating that the City's assessor failed to comply with the relevant statutes and the Wisconsin Property Assessment Manual, and by presenting significant contrary evidence of the properties' values.

¶2 We assume, without deciding, that the Trust overcame the presumption of correctness by showing the City's assessor failed to comply with the relevant law. Nevertheless, we conclude the Trust ultimately failed to carry its burden of persuasion that the 2011 assessments were excessive. We therefore affirm the judgment dismissing the Trust's excessive assessment claim.

BACKGROUND

¶3 The Trust owns five properties located on Mueller Street in Algoma. Each property is improved with a multi-family apartment building containing four to twelve units. For real estate tax purposes, each property is treated as a separate parcel. In 2011, the City assessed the five parcels at \$333,800; \$459,200; \$459,200; \$688,300; and \$459,200, respectively.

¶4 The Trust objected to the 2011 assessments before the City's board of review, pursuant to WIS. STAT. § 70.47.¹ The board sustained the assessments following an evidentiary hearing. The Trust then paid its 2011 real estate taxes under protest and filed an excessive assessment claim against the City, pursuant to WIS. STAT. § 74.37(2)(a). After the City disallowed the claim, the Trust filed the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

instant lawsuit, seeking a refund of excess real estate taxes paid in 2011. *See* WIS. STAT. § 74.37(3)(d).

¶5 The case was tried to the court on June 10, 2013. The City’s assessor, Michael Muelver, testified he completed a city-wide revaluation in 2007. At that time, only three of the apartment buildings on the Trust’s properties were completed, although the fourth was “close to completion.” Muelver based his 2007 assessments of the Trust’s properties “on an inspection of the parcels, photographing, and doing a new cost analysis, less depreciation.”² Muelver testified he could not value the Trust’s properties using the income approach in 2007 “because there was no income information” available at that time.

¶6 In 2009, the Trust provided Muelver with income information for the four apartment buildings that were then completed. Muelver did not believe the

² Case law sets forth a three-tier methodology for determining a property’s fair market value. *See Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶11, 317 Wis. 2d 228, 767 N.W.2d 567. “The best evidence of fair market value—known as Tier 1—is a ‘recent arm’s-length sale[] of the property.’” *Id.*, ¶21 (quoting WIS. STAT. § 70.32(1)). Here, it is undisputed there were no recent arm’s-length sales of the Trust’s properties for Muelver to consider.

In the absence of recent arm’s-length sales, an assessor proceeds to Tier 2 and applies the sales comparison approach. *See id.*, ¶22. Under the sales comparison approach, the assessor “relies on recent market sales of similar properties to predict the probable market price of the subject [property].” WISCONSIN PROPERTY ASSESSMENT MANUAL 7-23 (2013).

If there are no reasonably comparable sales, the assessor may use “any of the third-tier assessment methodologies[.]” which include the income approach and the cost approach. *Adams Outdoor Adver., Ltd. v. City of Madison*, 2006 WI 104, ¶¶34-35, 294 Wis. 2d 441, 717 N.W.2d 803. Under the cost approach, the assessor: (1) estimates the land value for the subject property; (2) estimates the cost to reproduce or replace the improvements on the subject property; (3) subtracts accrued depreciation to calculate the improvements’ present value; and (4) adds the improvements’ present value to the estimated land value to come up with a total property value. WISCONSIN PROPERTY ASSESSMENT MANUAL, *supra*, at 7-31. Under the income approach, the assessor calculates the property’s current value based on its income-generating potential. *Id.* at 9-14.

information provided by the Trust accurately reflected the value of the properties.

He explained:

[T]he income information showed some expense items were too high. ... [T]here were still some issues with renting out the buildings completely. And so I didn't feel we had a good stabilized Income and Expense Statement at that time, because typically that would show me that the expenses were running higher than they should be because you don't have the offsetting rental to hold those expense ratios down.

Despite his concerns, Muelver did adjust the 2009 assessments of the Trust's properties based on the income information he received.

¶7 The 2011 assessments of the Trust's properties remained unchanged from 2009. Muelver testified the City was in "maintenance mode" in 2011, and as a result, it was not improper to set the 2011 assessments at the 2009 levels. He explained, "In 2011, with no ... physical change to the property, my goal is to set a comparable assessment for all properties in [Algoma] but not to do a revaluation and establish the market value of each property." Muelver further explained his contract with the City required him to "keep the assessments within 10 percent of the equalized value, not allowing them to drop out of compliance for more than two years in a row so that the City is not required to pay for another full revaluation." Muelver later stated his contract required him to "maintain[] the assessments at the values established in 2007[, the year] of the revaluation, with the exception of those parcels that had changed physical characteristics or market adjustments." He conceded his goal in 2011 was not to determine the fair market values of the Trust's properties. He stated, "That was done in the year of the revaluation."

¶8 Muelver also conceded he had never valued the Trust's properties using the sales comparison approach. However, he asserted he "[did not] have any sales to compare them to." Muelver explained that, aside from the Trust's properties, there are only nine apartment buildings in Algoma with four or more units. He testified none of those properties are comparable to the Trust's properties because "five of them are under a government subsidized housing program, and the remainder are either converted residential homes into multiple units or [are] old 68- to 100-year-old buildings."

¶9 As contrary evidence of the properties' values, the Trust presented the testimony of appraiser Arthur Sullivan. Sullivan testified the Trust initially hired him to appraise all five of its properties as though they were a single real estate tax parcel. However, Sullivan ultimately concluded he could not do so because, while four of the properties could be appraised as a single unit, the property located at 1908 Mueller Street "was significantly different enough in style, size ... that it really warranted a separate set of comparables and a separate analysis on its own." Sullivan therefore valued the 1908 Mueller Street property separately and valued the remaining four properties as a single, hypothetical parcel.

¶10 Sullivan valued the 1908 Mueller Street property using both the sales comparison and income approaches. Under the sales comparison approach, he considered sales of five multi-unit apartment buildings located in the City of Sturgeon Bay, the Village of Luxemburg, the City of Green Bay, and the Village of Ashwaubenon that occurred between April 2008 and September 2011. By adjusting the sale prices of those properties upward or downward to account for dissimilarities with the 1908 Mueller Street property, Sullivan determined the fair market value of the 1908 Mueller Street property was \$302,000.

¶11 Under the income approach, Sullivan created a “Reconstructed Operating Statement” for the 1908 Mueller Street property “based on market derived and owner provided rents and expenses.” He used this information to calculate a net operating income for the property, to which he then applied a capitalization rate of 7.5 percent, resulting in a fair market value of \$217,000. Sullivan then averaged the values he reached using the sales comparison and income approaches to reach a final fair market value of \$260,000.

¶12 Sullivan used a similar method to value the hypothetical parcel made up of the Trust’s four remaining properties. First, he valued the hypothetical parcel using the sales comparison approach and reached a fair market value of \$1,890,000. He then valued the parcel using the income approach and reached a fair market value of \$1,745,000. Again, he averaged these values to calculate a final fair market value of \$1,815,000. Sullivan then “allocated” this fair market value among the four individual properties by: (1) dividing the total fair market value by the total square footage of the four apartment buildings; and (2) multiplying the resulting per-square-foot value of \$43.15 by each building’s actual square footage. In this way, Sullivan calculated fair market values of \$425,500, \$374,000, \$590,000, and \$425,500 for the four individual properties.

¶13 Sullivan conceded he did not use the cost approach when valuing the Trust’s properties. He explained he chose not to use that approach because “the buildings were new, and [he] discovered in the market ... that depreciation related to the buildings was significantly higher than one might typically consider in a cost approach.” Sullivan also conceded he was “not very familiar with” the Wisconsin Property Assessment Manual. When asked whether he had any criticisms of Muelver’s assessments, Sullivan responded he “ha[d] not reviewed how [the properties] were assessed[.]”

¶14 In contrast, Muelver criticized several aspects of Sullivan’s methodology. For instance, Muelver disagreed with Sullivan’s sales comparison analysis, stating Sullivan did not adequately account for differences in condition between the Trust’s properties and the comparables he used. When asked whether the comparables Sullivan used were actually comparable to the Trust’s property, Muelver stated,

They are probably as comparable as can be found in the area that Mr. Sullivan was looking. I know of no other comparables that would have been better, but I would question as to whether he extended the search far enough to find buildings that may have been better comparables.

Muelver also stated it was improper to value four of the Trust’s properties as a single, hypothetical parcel. He explained, “[T]hose four apartments are all on separate tax parcels. Very easy to sell them individually to maximize the sales value. There is nothing tying those parcels together as one.” In addition, Muelver disagreed with Sullivan’s choice not to value the properties using the cost approach.

¶15 In its posttrial briefs, the Trust argued the evidence demonstrated Muelver failed to comply with the relevant statutes and the Wisconsin Property Assessment Manual. The Trust also argued it had presented significant contrary evidence of the properties’ values. The Trust therefore asserted the 2011 assessments were not entitled to a presumption of correctness. The Trust also argued it had proven, “by the far greater weight of credible evidence,” that the 2011 assessments should have been equal to the fair market values testified to by Sullivan. Accordingly, the Trust asserted it was entitled to a refund of \$7,669.02 in excess real estate taxes for the year 2011.

¶16 The circuit court rejected the Trust’s arguments in a ten-page written decision, concluding the Trust had not overcome the presumption that Muelver’s assessments were correct. First, the court concluded Muelver “did follow the correct procedure for assessing the properties at issue under both the applicable statutes and the Wisconsin Property Assessment Manual.” Second, the court determined Sullivan’s testimony did not constitute significant contrary evidence of the properties’ values. The court noted, “The whole crux of this case ... rests upon the credibility of the expert witnesses presented at trial.” However, the court stated it “[did] not find either expert inherently more credible than the other.” The court stated the valuation process is “subjective and involves ... professional judgment,” and differences of opinion regarding value “can reasonably exist in the minds of the qualified expert appraisers.”

¶17 For instance, the court noted Sullivan adequately explained why he used the sales comparison approach to value the Trust’s properties, but Muelver adequately explained why he believed use of that approach was inappropriate. The court also credited Sullivan’s testimony explaining why he did not use the cost approach, but it found equally credible Muelver’s testimony explaining why he did not believe the income information provided by the Trust was reliable. Ultimately, the court stated it “[could not] find that either expert[’s] approach ... [was] inherently more credible than that of the other.” Because the court found Muelver’s and Sullivan’s opinions equally credible, it concluded Sullivan’s testimony was insufficient to overcome the presumption that Muelver’s assessments were correct.

¶18 Finally, the court concluded that, even if the Trust had overcome the presumption of correctness, it failed to meet its burden of persuasion that the assessments were excessive. The court explained:

[Mr. Sullivan's] credibility as an appraiser does not outweigh Mr. Muelver's credibility as an assessor in setting the property valuations at issue in this case. Mr. Sullivan is certainly qualified as an expert appraiser. He testified that he was asked by [the Trust] to identify the fair market value of the properties at issue. His expertise was not challenged, at least as to his ability to render any opinion on value. But as noted earlier, [the Trust] has not established that Mr. Sullivan is more credible than [Mr. Muelver] in determining the assessment value of the property at issue. This Court has found Mr. Sullivan is not more credible than Mr. Muelver. Moreover, Mr. Muelver is fully qualified as an assessor and competent to render opinions in regard to the value of the property that he is assessing, which is the real area of expertise at issue in this case. The Court must keep in mind that this is an assessment case and the assessed value of real estate is the value at issue.

The court again noted, "[T]here can be legitimate differences of expert opinion as to the value of any property at any given time."

¶19 The court subsequently entered a judgment dismissing the Trust's excessive assessment claim. The Trust now appeals.

DISCUSSION

¶20 On appeal from a circuit court's decision in an excessive assessment action commenced under WIS. STAT. § 74.37(3)(d), we review the record made before the circuit court, not the board of review. *Adams Outdoor Adver., Ltd. v. City of Madison*, 2006 WI 104, ¶24, 294 Wis. 2d 441, 717 N.W.2d 803. When considering a claim under § 74.37(3)(d), a court need not defer to any determination made at a previous proceeding before the board of review. *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶12, 317 Wis. 2d 228, 767 N.W.2d 567. However, the court must accord a presumption of correctness to the assessor's assessment. *Id.*; see also WIS. STAT. § 70.49(2). A taxpayer may overcome this presumption either by: (1) presenting significant contrary evidence

of the property's value; or (2) showing the assessor failed to apply the principles set forth in the relevant statutes and the Wisconsin Property Assessment Manual. *Allright Props.*, 317 Wis. 2d 228, ¶12.

¶21 The Trust argues it overcame the presumption of correctness by showing Muelver failed to comply with the relevant statutes and the Wisconsin Property Assessment Manual. Specifically, the Trust argues Muelver: (1) failed to base the 2011 assessments on the properties' fair market values as of January 1, 2011, as required by WIS. STAT. §§ 70.10 and 70.32(1); (2) inappropriately considered the City's equalized value³ when setting the assessments; (3) failed to use the sales comparison approach; and (4) failed to assess the properties from the best information available. The Trust also argues it overcame the presumption of correctness because Sullivan's testimony constituted significant contrary evidence of the properties' fair market values.

¶22 We assume, without deciding, that the Trust overcame the presumption of correctness by showing Muelver's assessments were not made according to law. Nevertheless, we conclude the circuit court properly dismissed the Trust's excessive assessment claim because the Trust failed to carry its burden of persuasion that the assessments were excessive.

¶23 On appeal, the City asserts that, "[e]ven when the taxpayer overcomes the presumption of correctness, it must still persuade the trial court that

³ "Equalization is the state Department of Revenue's independent evaluation of the total value of real property within a municipality. Equalized value is not a measure of fair market value of a particular parcel within the municipality but rather is a test of the local assessor's overall valuations." *State ex rel. Kesselman v. Board of Review for Sturtevant*, 133 Wis. 2d 122, 131-32, 394 N.W.2d 745 (Ct. App. 1986) (citations omitted).

its evidence of value is more credible than the assessor[']s.” Similarly, in the circuit court, the Trust conceded that, even if it overcame the presumption of correctness, it still had the burden to persuade the court the assessments were excessive. The Trust further conceded, “The burden of persuasion simply means that if [the Trust’s] evidence and the City’s evidence are *equally* persuasive, the City, like any civil defendant, prevails; if [the Trust’s] evidence is more credible, [the Trust] should prevail.”⁴

¶24 The circuit court concluded Muelver and Sullivan were equally credible. We must uphold this finding of fact unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2) (factual findings are upheld unless clearly erroneous); *Lessor v. Wangelin*, 221 Wis. 2d 659, 665-66, 586 N.W.2d 1 (Ct. App. 1998) (witness credibility is a finding of fact). A finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615. “[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record.” *State v. Wenk*, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417. Moreover, the weight and credibility to be given to expert witness opinions are “uniquely within the province of the fact finder.” *Bloomer Housing Ltd. P’Ship v. City of*

⁴ We assume, without deciding, that this analysis of the placement of the burden of persuasion is correct. Nevertheless, we note there is no clear, binding precedent on this issue. In *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, ¶9, 351 Wis. 2d 439, 839 N.W.2d 893, this court addressed the placement of the burden of persuasion before the presumption of correctness has been overcome, but not after. The Wisconsin Tax Appeals Commission has held that, after a taxpayer overcomes the presumption of correctness, the burden remains with the taxpayer to persuade the fact finder that “its appraisal is better than the [government’s] appraisal[.]” *See Universal Foods Corp. v. DOR*, No. 95-M-1637 (Wisconsin Tax Appeals Comm’n Sept. 8, 1997). However, we are not bound by the Tax Appeals Commission’s decisions.

Bloomer, 2002 WI App 252, ¶12, 257 Wis. 2d 883, 653 N.W.2d 309 (quoting *Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993)).

¶25 Here, the circuit court’s finding that Muelver and Sullivan were equally credible is amply supported by the evidence and is not clearly erroneous. Both Muelver and Sullivan provided extensive testimony regarding their qualifications and the methods they used to value the Trust’s properties. Although they each used different approaches, they both persuasively explained why they selected their chosen methodologies. For instance, Muelver explained he did not use the sales comparison approach because he did not believe there were any recent sales of properties comparable to the Trust’s properties. He criticized the comparable sales that Sullivan considered, stating Sullivan did not adequately account for differences in property condition. Muelver also explained why he did not believe the income information provided by the Trust was accurate.

¶26 In contrast, Sullivan explained in detail his use of the sales comparison and income approaches. He also explained he chose not to use the cost approach because he concluded the rate of depreciation reflected in the market was too high to use in a cost-less-depreciation analysis. However, Sullivan conceded he was not very familiar with the Wisconsin Property Assessment Manual, and he did not express any specific criticisms of Muelver’s methodology. He also conceded valuing property is “relative, subjective, and intuitive,” and he further stated appraisal is not “an exact science[.]” On this record, the circuit court could reasonably conclude that Muelver and Sullivan had a “legitimate difference[] of expert opinion” regarding the values of the Trust’s properties, but both expert’s opinions were equally credible.

¶27 The Trust argues Muelver's opinion must have been less credible than Sullivan's because Muelver set the 2011 assessments based on the properties' assessed values for the year 2009, without considering the properties' fair market values as of January 1, 2011. *See* WIS. STAT. § 70.10 (assessor shall assess real property as of the close of January 1 of each year). However, Muelver testified that in 2007, the year of the city-wide revaluation, he determined the assessed values of the Trust's properties based on their fair market values. Muelver explained he adjusted the properties' assessed values in 2009 based on income information he received from the Trust. Muelver conceded he did not redetermine the properties' fair market values in 2011; however, he explained he does not typically do so in a maintenance year absent a physical change in the condition of a property or a change in market conditions. On appeal, the Trust does not cite any evidence or develop any argument that such a change took place between 2009 and 2011.

¶28 Finally, the Trust argues that, because Muelver failed to comply with the relevant statutes and the Wisconsin Property Assessment Manual, the 2011 assessments were invalid as a matter of law. However, the Trust never raised this argument in the circuit court. It has therefore forfeited its right to raise the argument on appeal. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for first time on appeal are generally deemed forfeited). We do not "blindsides trial courts with reversals based on theories which did not originate in their forum." *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Moreover, in its posttrial briefs, the Trust explicitly conceded that, even if it overcame the presumption of correctness, it still had the burden to persuade the circuit court the 2011 assessments were excessive. The Trust further stated that, if the court found the City's evidence of value more

credible than the Trust's evidence, the City would prevail. Having induced the circuit court to rely on one theory of the law, the Trust will not be heard to argue a contrary theory on appeal. *See Keller v. Keller*, 2002 WI App 161, ¶9, 256 Wis. 2d 401, 647 N.W.2d 426.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

